



United States Department of the Interior
BUREAU OF LAND MANAGEMENT
Eastern States
20 M Street, SE Suite 950
Washington, DC 20003
<http://www.es.blm.gov>



In Reply Refer to:
3120 (930 NVM)
March 2018 Lease Sale

MAR 21 2018

CERTIFIED MAIL—RETURN RECEIPT REQUESTED **_****_****_****_******

Center for Biological Diversity
1212 Broadway #800
Oakland, CA 94612

Sierra Club
2101 Webster Street, Suite 1300
Oakland, CA 94612

Ohio Environmental Council
1145 Chesapeake, Ave., Suite I
Columbus, OH 43212

Heartwood
PO Box 1926
Bloomington, IN 47402

Athens County Fracking Action
8474 Terrell Rd
Athens, Ohio 45701

Buckeye Environmental Network
P.O. Box 824
Athens, Ohio 45701

DECISION

: March 22, 2018
: Competitive Oil and Gas
: Lease Sale

PROTEST DENIED

On February 20th 2018, 11, 2017, the Bureau of Land Management (BLM) Eastern States Office (ESO) timely received a protest filed on behalf of the above cited parties (Protesters) disputing the inclusion of 2 Ohio¹ parcels (Ohio Parcels) in the BLM Eastern States March 22, 2018 Competitive Oil and Gas Lease Sale (March Lease Sale). For the reasons stated below, the protest is hereby denied.

PROTESTER'S STANDING

In the Protest Letter (Pages 1-142) submitted, the groups provided a summary of their organizations' general objectives and list of affiliates from Heartwood, Sierra Club, Athens County Fracking Action Network, and Buckeye Environmental Network were provided without signatures. Also, the groups incorporated by reference the following documents:

Exhibit A- October 12, 2017 Protest of the BLM's December 14, 2017 Competitive Oil and Gas Lease Sale and the Determination of NEPA Adequacy (DNA)

Exhibit B- Center et al,'s September 6, 2017 Comments on the BLM's Determination of NEPA Adequacy for the December, 2017 Competitive Oil and Gas Lease Sale, Wayne

¹OHES059251, OHES 059252

National Forest

Exhibit C- Center et al.'s November 30, 2017 Comments on Environmental Assessment for Rolland Applications for Permit to Drill

Exhibit D- Center et al.'s January 24, 2017 Supplemental Comments on Environmental Assessment for Rolland Applications for Permit to Drill

However, the BLM has previously answered to the statements included within Exhibit A and incorporates by reference the *BLM's December 14, 2017 Protest Resolution Letter*.²

In regards to Exhibit B, any comments submitted to the Draft DNA were deemed as addressed by the BLM in the Final DNA uploaded to the project page within the NEPA Register. Furthermore, Exhibits C and D do not relate to the leasing process or the NEPA document that relates to the March 2018 Oil and Gas Lease sale itself, and are therefore deemed as not substantive.

In addition, none of the parties has provided to the BLM "colorable allegations of an adverse effect, supported by specific facts, set forth in an affidavit, declaration, or other statement of an affected individual, sufficient to establish a causal relationship between the approved action and the injury alleged" (183 IBLA 97, 107). Therefore, these groups' allegations of adverse effects are deemed general claims of use of the Wayne National Forest from some members. However, it is not clear whether these statements establish the Protesters as a party to the case and/or as having a legally cognizable interest that would be adversely affected by the BLM's decision to issue any of the protested leases.

Nonetheless, given the BLM's directions to the public in the Sale Notice regarding submittal of protests, and the lack of specific agency guidance for adjudicating when an individual or group may have standing to protest lease parcels, the BLM has decided to answer the specific arguments made by the Protesters. However, the BLM does so with the reservation that the Protesters may not have standing to bring an appeal of this protest decision to the IBLA.

DISCUSSION

BLM has identified the following arguments from the Protest Letter as to why the Subject Parcels should not be offered at the March Lease Sale. Below is a discussion of the specifics as to the Protesters' arguments, as well as BLM Eastern States' responses.

A. BLM's failure to assess the potential environmental effects associated with the leasing and development of the parcels, including impacts to public health and water resources

Protesters argue that "the EA fails to analyze numerous impacts related to fracking, including potential threats to human health and risks to water resources". However, hydraulic fracturing is just a single aspect of overall oil and gas development, which has been analyzed throughout the Marietta EA. The Marietta EA considers impacts to public health and safety of oil and gas development, including the use of hydraulic fracturing, in depth. As to public health and safety effects, the Marietta EA states that (Page 7):

No direct effects from leasing. From future reasonably foreseeable development, effects

² (<https://cplanning.blm.gov/cpl-front-office/cplanning/planAndProjectSite.do?methodName=dispatchToPatternPage¤tPageId=122459>)

include potential exposure to contamination that may cause health conditions in sensitive or susceptible populations. However, federal, state, and local regulations, as well as health standards and protocols ensure that potential operations do not compromise public health and safety.

The Marietta EA discusses the mitigating measures that would be attached to any potential lease, which led to this determination that oil and gas development may occur without significant environmental impacts (Pages 65-66):

The 2006 Forest Plan/EIS identifies standards for mineral development that the WNF implements to provide a healthy and safe environment for people and wildlife. Some examples are:

- SFW-MIN-2: Require that all proposed surface-disturbing mineral activities have an approved operation and reclamation plan before the activity begins;

- SFW-MIN-3: Require that operators conduct activities and maintain equipment to prevent the discharge of oil or brine onto the ground or into surface waters;

- SFW-MIN-4: Upon discovery or notification of an accidental spill of crude oil or brine that discharges, or threatens to discharge, into surface waters, notify the Ohio Environmental Protection Agency Emergency Response and Special Investigations unit in Columbus; and

- SFW-SAFE-19: Any wastewater that originates from oil and gas operations would be considered non-federal and so disposal would not be allowed on Wayne National Forest lands (including the roads under jurisdiction of the WNF). In addition, the Ohio Revised Code only allows for four different disposal methods of fluids associated with oil and gas operations: injection, surface application (on roads only, and only when permitted by the authority with jurisdiction over the road), enhanced recovery (reuse of the fluids in other wells) or other methods to test new technologies and methodologies (ORC 1509.22(C)(1)).

Furthermore, the law specifically states that no one is allowed to place fluids associated with oil and gas operations in surface or groundwater or in or on the land in amounts that cause or could cause pollution of water used for human or domestic animal consumption or damage/injury to public health and safety or the environment (ORC 1509.22).

Other provisions for employees and the public that provide for safety within the WNF include:

- SFW-SAFE-17: Post warnings of dangerous conditions and threats of immediate concern for the safety of Forest employees and the public; and

- SFW-SAFE-18: Issue closure orders to protect the public when clear and present dangers cannot be mitigated in a timely manner.

The Division of Oil and Gas Resources Management (DOGRM) within Ohio's Department of Natural Resources (DNR) maintains an electronic database with information needed in

the case of an emergency situation that poses a threat to public health, safety or the environment. Minimum information required is that which is also required for the Emergency Planning and Community Right-To-Know Act regulations (ORC 1509.23(B)). Amended Substitute Senate Bill 315 was signed into law by the Governor on June 11, 2012. This bill amends Ohio Revised Code to require the owner of a well to provide emergency responders with the exact chemical composition of all fluids used in the drilling and stimulating of a well. Exact composition of each proprietary component is made available upon request from emergency responders (Amended ORC 1509.10(H)).

The Marietta EA adequately analyzes the current state, and potential impacts, on water resources related to the proposed action. The Marietta EA states as to the effects to water resources and quality from potential oil and gas leasing and development (Page 6):

No direct effects from leasing. Potential for large surface water withdrawals for drilling and completion associated with potential reasonably foreseeable future development. Some risk of chemical spills and erosion from roads and well pads. Future reasonably foreseeable effects minimized by Forest Service policies for water withdrawal and waterway protection and soil conservation measures. Additional protections required by the Onshore Orders.

The Marietta EA goes on to acknowledge (Page 105):

While the act of leasing federal minerals would produce no impacts to surface water quality, subsequent exploration and development of the lease parcels have the potential to produce impacts. The potential effects to surface water from reasonably foreseeable mineral development include sediment loading of stream channels due to the erosion associated with site development or operational transport and introduction of pollutants, toxic chemicals, sediment or debris, via spills and releases to surface water from oil/produced water treatment, storage tanks, handling and sanitary facilities or oil/produced water transportation mediums (trucks or pipelines).

Specifically, the Marietta EA addresses concerns regarding withdrawals of water for oil and gas operations (Page 106):

The BLM and Forest Service would not approve water withdrawals that would draw down a surface waterbody to the extent that aquatic life would be measurably adversely impacted, for example, by dewatering a stream enough to entrap fish or expose mussels to dry conditions in a stream that would normally have perennial flow.

As to local aquifers and groundwater, the Marietta EA states (Page 106):

Local aquifers (within the Marietta Unit) do not yield sufficient water to support industrial activities within the Marietta Unit. Therefore, the likelihood that the proposed leasing action and potential future mineral development would affect groundwater quantity is negligible.

However, the Marietta EA does acknowledge potential environmental concerns to water resources, as well as mitigating measures (Page 106):

Future mineral development activities would pose some risk of accidental spills of

drilling fluids, produced water, and other chemicals (see also Section 4.7, Wastes, Hazardous or Solid). This risk would be minimized by the requirement, described in the 2012 SIR, for operators to use tanks, instead of open pits, to hold all fluids other than fresh water... The only areas where a spill would pose an unacceptable risk to groundwater quality are designated wellhead protection areas or certain locations within the Ohio River and Little Muskingum River floodplains (Thompson, 2012). Other locations throughout the Marietta Unit tend to have low groundwater pollution potential due to low hydraulic conductivity and depths of groundwater (around 200 feet or less from the surface). Drilling to a production zone that is below a potable water-bearing formation poses the risk of allowing brine and other chemicals to migrate up into a potable water zone. This risk is mitigated in federal wells by casing and cementing requirements in Onshore Oil and Gas Order Number 2.

Therefore, Protesters arguments as to BLM's failure to address potential impacts of hydraulic fracturing on public health and water resources are denied.

B. BLM Underestimated Surface Disturbance Impacts from Limits Of Disturbance ("LODs"), Gathering Lines, Well Pads, and Compressor Stations

Protesters argue "the EA ignores or underestimates surface disturbance from well pads, compressor stations, wastewater ponds, and gathering lines" (Page 9). The Marietta EA draws from BLM's expertise to estimate the surface disturbance from all oil related activities. The Marietta EA states (Page 23):

Although there would be no surface disturbance from the action of leasing, the EA analyzes a reasonably foreseeable development scenario (RFDS) to address the potential environmental effects from potential future oil and gas development.

In addition, the Marietta EA explains how this projection was developed (Page 24):

The 2006 RFDS projected a total of 135 acres of disturbance (see Table 2-1, below) to federal surface in the Marietta Unit from exploration and production activities, regardless of mineral ownership (scenarios A and B in Figure 2.1.), with 121 acres needed to support long term production. The analysis assumed that after exploration and production ceased, 151 acres would be reclaimed per state and federal requirements. The projected surface disturbance included all acreage potentially affected by future oil and gas development activities, such as road construction; well pad construction, construction of turnaround/production facility areas, pipelines, and other related activities.

. . . approximately 10 acres have already been disturbed from oil and gas development in the Marietta Unit; therefore, the remaining acreage of surface disturbance that could occur within the Marietta Unit that is analyzed in this EA, is approximately 70 acres. Of those 70 acres, approximately 40 acres of disturbance would persist for the long term, until final reclamation is completed.

The Marietta EA states what activities may occur due to development (Page 25):

Reasonably foreseeable activities that could occur as a result of future oil and gas

development associated with leasing in the Marietta Unit include surface disturbance associated with preparation for drilling including construction of a road, drilling pad, and reserve pit. Constructed access roads normally have a running surface width of approximately 12 to 16 feet; the length is dependent upon the well site location in relation to existing roads or highways. The average length of road construction is approximately 0.5 miles per well pad. Therefore, approximately two acres would likely be affected by road construction. Typically from 3 to 5.5 acres are cleared and graded level for the construction of the drilling pad. If horizontal drilling occurs, each drilling pad could have up to eight lateral lines. If the well produces natural gas, and the flowline is in the road, another 0.5 acres may be affected by flowline construction. These disturbances are typical for private or federal ownership well pad locations but may be subject to adjustment based on site-specific conditions, which have not yet been determined.

Therefore, Protesters arguments as to surface disturbance estimates on the Marietta Unit are denied.

C. BLM's failure to initiate or complete consultation under section 106 of the National Historic Preservation Act (NHPA)

The Marietta EA adequately addresses the NHPA, and is consistent with all required policy and regulation. The Marietta EA states (Page 113):

... The BLM initiated consultation with the Ohio SHPO under Section 106 of the NHPA, by letter dated November 16, 2015; to date, the SHPO has not responded to the letter, indicating that they have found no adverse effects on historic properties within the scope of the Proposed Action. Further consultation will take place at the APD phase prior to ground disturbing activities.

Therefore, Protesters argument as to BLM's failure to comply with the NHPA is denied.

D. BLM's failure to consult with the USFWS over the impacts of its leasing on threatened and endangered species, such as the Indiana Bat and the Northern Long Eared Bat, and the improper reliance on an outdated BO to fulfill its consultation duties under the ESA

Protesters argue that "BLM violated the ESA by failing to consult with FWS concerning the impacts of its oil and gas leasing proposal on listed species". However, the Forest Service and the BLM have consulted with the FWS multiple times as the respective agencies have analyzed the potential for oil and gas leasing within the Marietta Unit of the Wayne National Forest.

The Marietta EA details the timelines of the various Section 7 consultations (Pages 18-19):

The Forest Service completed a Biological Evaluation (BE) and the USFWS issued its Biological Opinion (BO) on November 22, 2005. The BO established a tiered approach to the Section 7 consultation. The programmatic (Tier I) BO (November 22, 2005) covers all the activities described in the 2006 Forest Plan/EIS at a programmatic, non-site-specific level. Because the BLM was a cooperating agency in the 2006 Forest Plan and EIS, the consultation conducted with respect to the 2006 Forest Plan and EIS applies to the

Proposed Action analyzed in this EA... As part of the 2012 SIR, the Forest Service reviewed new information related to hydraulic fracturing and whether there could be additional effects to threatened and endangered species that had not been previously analyzed in the 2006 Plan/ EIS. The Forest Service and the USFWS concluded that no further analysis or consultation was needed and that the consultation conducted under the 2006 Plan/EIS was still valid. As the BLM analyzes individual projects pursuant to the Forest Plan, the BLM is responsible for reinitiating consultation and providing the USFWS with additional information; this process is called Tier II consultation. The BLM would submit a Tier II Biological Assessment to the USFWS when it receives an APD, if it determines that potential effects to critical habitat, fish or wildlife could occur.

As to the Indiana bat, the Marietta EA states that there are no documented hibernacula within the Marietta Unit in Ohio (Page 48):

The WNF contains one documented hibernaculum, and it is not on the Marietta Unit...the Athens and Ironton Units most likely contain the most heavily concentrated populations of Indiana bat, based on thorough surveys conducted previously throughout the WNF by the USFWS.

The BLM also adopts in the Marietta EA the 4(d) rule, recently issued by the FWS, to address the newly listed Northern Long Eared bat (Page 19):

More recently, a BO was issued by the USFWS in 2016 for the 4(d) rule for the federally listed, threatened northern long-eared bat. This rule exempts incidental take of northern long-eared bat for federal actions that adhere to certain, basic conservation measures. The Forest Service operates under this BO and therefore the Proposed Action is also covered under the BO.

For the Northern Long Eared Bat, the Marietta EA clearly states BLM reliance on the 4(d) rule of the USFWS. This rule states that in areas of the bat's range that may be affected by white-nose syndrome, incidental take caused by some tree removal and tree-clearing activities, does not need to be prohibited to conserve the bat if conservation measures that protect the bat's most vulnerable life stages are taken. Specifically, the Marietta EA states (Pages 100-101):

It is possible that tree removal may result in impacts to individual northern long-eared bats. This risk is minimized by the application of lease stipulations designed to protect Indiana bat. The stipulations that pertain to oil and gas leasing on the Wayne National Forest are more restrictive than the requirements provided in the Fish and Wildlife Service's 4(d) rule for northern long-eared bat, and any incidental take of northern long-eared bat would comply with the exemption provided by the 2016 4(d) rule. The 4(d) rule exempts take from tree-removal activities that take place more than one-quarter mile from a known hibernaculum, and it exempts tree removal outside of the pup season (June 1 – July 31). There are no known bat hibernacula on the Marietta Unit.

Furthermore, the BLM worked directly with the FWS to identify the species to be considered for potential leasing within the Marietta Unit. As a result of that informal consultation, the BLM NSD

prepared a Biological Assessment (BA). The BA concluded that proposed oil and gas leasing was not likely to adversely affect the threatened and endangered species identified by the FWS.

In addition, Protesters argue that "BLM's reliance on the 2005 Biological Opinion is misplaced because it is out of date". However, as the Marietta EA states, Forest Service reasonably decided consultation was not necessary in light of the information provided in the 2012 SIR (Page 173):

The 2012 SIR was completed to determine if the 2006 Forest Plan/EIS needed to be updated in light of new information regarding hydraulic fracturing. The Forest Service determined that the potential effects associated with hydraulic fracturing and horizontal drilling were not significantly different from those of vertical drilling and that the mitigation measures in place for vertical drilling would suffice for horizontal drilling/hydraulic fracturing.

As to BLM's role in this analysis, the Marietta EA explains (Page 177):

BLM was a cooperating agency on the 2006 Forest Plan/EIS and provided input for the 2012 SIR.... Both the Forest Service and the USFWS concurred that no further analysis or Endangered Species Act consultation was needed at this stage.

On November 4, 2015, a letter containing a BLM prepared a Biological Assessment (BA) was sent to FWS by the NSD. The conclusion of the Biological Assessment was that proposed leasing, with the protective measures incorporated into the lease terms, was not likely to adversely affect the Northern long-eared bat, Indiana bat, Fanshell mussel, Snuffbox mussel, Sheepnose mussel, Pink mucket pearly mussel, American Burying beetle, Northern monkshood, Running buffalo clover, Small whorled pogonia, and the *Virginia spirea*. The protective measures outlined in the BLM's Biological Assessment incorporated stipulations and notices found in the US Forest Service 2006 LRMP/EIS and associated Biological Opinion, plus additional measures for protection of Northern long-eared bat hibernacula and requirements to keep wildlife out of tanks.

Consistent with the ESA regulations and guidance outlined in the US Forest Service 2006 LRMP/EIS and associated Biological Opinion, the BLM and US Forest Service would prepare and submit a Tier II Biological Assessment if, subsequent to leasing, an application for permit to drill is filed with the BLM. Again, the protective measures attached to a lease provide the prospective lessee notice that protection of those species must be taken into consideration if an application for permit to drill is submitted to the BLM. Additional consultation with the US Fish and wildlife Service would be required at that time.

Therefore, Protesters' argument that BLM violated Section 7 of the ESA for failing to consult with FWS and that BLM's reliance on the 2005 Forest Plan Biological Opinion is misplaced, and consultation must be reinitiated, are denied.

DECISION

After a careful review, it has been determined that all of the protested Subject Parcels as described in the March Sale Notice may be offered at the March Lease Sale. The protests to all Lease Sale Parcels are denied for the reasons described above.

You may appeal this decision to the Interior Board of Land Appeals, Office of the Secretary, in accordance with the regulations contained in 43 CFR, Part 4 and the attached Form 1842-1 (Attachment 2). If you file an appeal, your notice of appeal must be filed in the BLM Eastern States Office, 20 M Street SE, Suite 950 Washington, D.C. 20003, within 30 days from receipt of this decision. You have the burden of showing that the decision appealed from is in error.

If you wish to file a petition (pursuant to regulation 43 CFR 4.21) (request) for a stay (suspension) of the effectiveness of this decision during the time that your appeal is being reviewed by the Board, the petition for a stay must accompany your notice of appeal. A petition for a stay is required to show sufficient justification based on the standards listed below. Copies of the notice of appeal and petition for a stay must also be submitted to each party named in this decision and to the Interior Board of Land Appeals and to the appropriate Office of the Solicitor (see 43 CFR 4.413) at the same time the original documents are filed with this office. If you request a stay, you have the burden of proof to demonstrate that a stay should be granted.

Standard for Obtaining a Stay

Except as otherwise provided by law or other pertinent regulation, a petition for a stay of a decision pending appeal shall show sufficient justification based on the following standards:

- (1) The relative harm to the parties if the stay is granted or denied,
- (2) The likelihood of the appellant's success on the merits,
- (3) The likelihood of immediate and irreparable harm if the stay is not granted, and
- (4) Whether the public interest favors granting the stay.

Please contact Elena Fink (Deputy State Director, Natural Resources) at (202) 912-7730 or Nicole Virella (Planning & Environmental Specialist) at (202) 912-7739 with any further questions or concerns.



Mitch Leverette
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